APPENDIX A.

On Appeal From the United States District Court for the Eastern District of Michigan.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, Defendants-Appellants.

Monex International, Ltd., Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants, Nos. 81-1750, 82-1024, 81-1803.

Decided and Filed May 3, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

Merritt, Circuit Judge. Before the administrative trial began, the District Court enjoined the defendant administrative agency from proceeding with an adjudicatory hearing to be conducted under section 5 of the Administrative Procedure Act, 5 U.S.C. § 554 (1976), against the plaintiffs, who are commodity dealers. It did so apparently on two theories: that the plaintiffs will be unable to get a fair trial before the agency and that the question of commodity law presented by the agency's administrative complaint against plaintiffs requires resolution first by rule making procedures under section 4 of the Administrative Procedure Act. We reverse. The record does not support an advance determination that the adjudicatory proceeding initiated by the administrative complaint will be unfair. Under applicable principles of administrative law the agency itself is entitled to choose in the first instance the administrative processes

to be used in resolving the questions involved without prior judicial intervention or advance judicial clearance of its administrative processes. Thus the filing of a complaint initiating the adjudicatory proceeding does not constitute "final agency action" under section 10(c) of the APA, 5 U.S C. § 704, subject to judicial review at this time. Upon completion of the administrative process, the agency's decision and its procedures will be subject to judicial review in the normal course under Chapter 7 of the Administrative Procedure Act.

I

Plaintiff corporations are engaged in the purchase and sale of contracts for precious metals. Since 1975 Monex has sold gold and silver contracts directly to the public under a form of contract broadly labeled a "forward contract." First National Monetary Corporation has offered similar contracts, called "cash forward contracts" since 1978. Under both contracts the customer makes a down payment, and the dealer "fowards" the rest of the contract price, for which the customer is charged a fee. The contracts are usually liquidated by offsetting transactions rather than by taking delivery of the commodity under the contract. The administrative complaint alleges that the contracts are "futures" contracts and are illegal under the Commodity Exchange Act because not consummated on an exchange or regulated "contract market." Both corporations claim that these contracts are in the nature of "leverage" contracts potentially subject to regulation by the Commodity Futures Trading Commission. But they assert that the agency can only regulate the contracts through rule making procedures and not by adjudicatory administrative processes.

The federal administrative agency, the Commodity Futures Trading Commission, is charged with the responsibility of regulating "transactions involving contracts of sale

of a commodity for future delivery . . ." 7 U.S.C. § 2 (1976). These "futures" contracts are subject to extensive regulation and must be executed through a commodities exchange or "contract market." 7 U.S.C. § 6(h). Excluded from the term "future delivery," is "any sale of any cash commodity for deferred shipment or delivery." 7 U.S.C. § 2. A 1978 amendment to the Commodities Exchange Act gives the Commission authority to regulate "leverage" and "margin" contracts "for the delivery of silver bullion, gold bullion, or bulk silver coins or bulk gold coins," but "only after notice and opportunity for hearing." 7 U.S.C. § 23(b).

On September 5, 1978, the Commission Office of General Counsel submitted a memorandum to the Commission which stated that "all leverage transactions" in gold and silver are futures contracts subject to the Commission's regulatory authority. On the basis of this memorandum, the Commission solicited public comment on a proposal to regulate such leverage transactions. After analysis of public comment, which included comments by plaintiffs, the Commission announced a proposal to determine, effective January 1, 1980, that "leverage" tranactions for gold and silver "of the type presently being offered to the public" are futures contracts.

On August 8, 1979, the Commission filed administrative complaints against plaintiffs charging that they are in violation of the Act by selling forward contracts other than through a contract market. On November 20, 1979, the Commission moved back the effective date of its decision to treat forward contracts as futures contracts until June 30, 1980. On May 28, 1980, the postponement date was extended to October 1, 1982. The plaintiffs moved for a stay of proceedings against them until the October 2, 1982, date. An Administrative Law Judge granted the stay reasoning that because the Commission had decided to postpone the

effective date of its decision to regulate leverage contracts, the same rationale should extend to adjudicatory proceedings. On interlocutory review the Commission vacated the stay, finding that the Administrative Law Judge had abused his discretion by equating "forward" contracts with "leverage" contracts. The administrative trial was set for November 23, 1981.

On November 18, 1981, Monex filed suit in the Central District of California, and First National filed suit in the Eastern District of Michigan. Both actions sought to enjoin the Commission from proceeding with the adjudicatory proceedings on grounds that the Commission must act by rule before it acts by adjudicatory order. The District Court in California issued a temporary restraining order and transferred the case to the Eastern District of Michigan. The District Court in Michigan also issued a temporary restraining order pending a hearing on the preliminary injunction. Following briefing and oral argument by the parties, the District Court granted a preliminary injunction in an oral opinion from the bench on December 17, 1981. The District Judge held that further exhaustion of administration remedies by plaintiffs was not required and that the Commission must act by rule making rather than adjudication in determining the question whether plaintiffs' "forward" contracts are "futures" contracts under the statute subject to execution only through commodities exchanges. It held that the filing of the administrative complaint constitutes final agency action and that it appeared that plaintiffs could not receive a fair administrative trial and disposition through adjudicatory proceedings. The District Court issued a preliminary injunction enjoining the administrative trial and restraining the conduct of further adjudicatory proceedings on the complaint issued by the Commission, finding that plaintiffs would suffer irreparable injury in the form of economic loss and injury to good will if the questions raised

by the administrative complaint were decided by the agency through adjudicatory proceedings.

II

Section 10(c) of the APA provides for judicial review only of "agency action" (1) "made reviewable by statute" and (2) "final agency action." It provides further that "preliminary" matters "not directly reviewable" are "subject to review on the review of the final agency action." 5 U.S.C. § 704. Since the complaint here is not "made reviewable by statute," the question is whether its issuance constitutes "final agency action." The District Court held that the filing of the complaint is a "final agency action." We do not agree.

If "final agency action" means the same thing as "final decision" under § 1291, Title 28, it is clear that the act of filing a complaint is interlocutory and not "final." We do not need to strictly equate the two in order to recognize the obvious fact that many of the same considerations of finality apply in defining the two concepts. *See Pepsico, Inc. v. Federal Trade Comm'n*, 472 F.2d 179 (2nd Cir. 1972), *cert. denied* 414 U.S. 876 (1973). The Supreme Court has also suggested that similar considerations apply in its recent decision concluding that the filing of an FTC administrative complaint initiating an adjudicatory proceeding against the oil companies is not "final agency action," *Federal Trade Comm'n v. Standard Oil of California*, 449 U.S. 232 (1980). Plaintiffs argue that *Socal* is not in point because here plaintiffs are attacking the "authority," the "power," of the agency to proceed by filing an administrative complaint preliminary to an adjudicatory proceeding. *Socal* cannot be so easily distinguished. Similar arguments were made there. The claim in *Socal* was that the agency acted beyond its delegated authority in issuing the complaint because it had not made necessary precomplaint findings. The

Supreme Court discussed the finality considerations as follows:

> Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. . . . Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. . . . Finally, every respondent to a Commission complaint could make the claim that Socal had made. Judicial review of the averments in the Commission's complaints should not be a means of turning prosecutor into defendant before adjudication concludes.

Socal, supra, 449 U.S. at 242-243. Similar considerations apply here. In addition, as explained below, we disagree with the holding of District Judge Gilmore that the issuance of the complaint is so plainly beyond the jurisdiction of the Commission that the administrative proceedings must necessarily turn out to be void whatever their outcome.

Plaintiff makes two basic arguments, both of which the District Court apparently accepted, that the complaint initiating adjudicatory proceedings is so plainly beyond the Commission's power that a court should intervene at the outset to declare the proceedings a nullity. We disagree with both arguments.

First, plaintiffs ask us to assume in advance of the administrative trial and disposition that they will lose and that the administrative proceedings are "futile" (Brief of First National Monetary Corp., 45-47), that the administrative agency will act illegally, that a retroactive order will be entered punishing them unfairly and that they will be harmed irreparably before they can obtain judicial review and redress (*id.* at 57-70). The District Court appears to have accepted some or all of these propositions in its oral decision from the bench enjoining the agency in advance from hear-

ing the case. We cannot accept these propositions in the absence of an administrative record which indicates that they are true. To the extent that the District Court in its oral disposition rested its decision on such predictions regarding the future course of administrative proceedings, we conclude that its findings are clearly erroneous and wholly unsupported by the present record. We do not know at this point what course the administrative proceedings will take, but we are not empowered to intrude into the administrative proceedings in advance on the basis of such assumptions. As the Supreme Court noted in *Socal* the plaintiffs will not be "bound by the Commission's decision until judicial review is complete," 449 U.S. at 24, and the necessity of first litigating the issues before an administrative agency does not constitute irreparable injury, *id.* at 244.

The plaintiffs' second argument is that the agency can do nothing in the way of adjudication respecting the plaintiffs' off-exchange "forward" or "leverage" metals contracts until the agency issues detailed regulations governing the conduct in question. To the extent that the court below accepted this argument before the administrative process was completed, it erred. Although it is true that the difference between "futures," "margin," "leverage" and "forward" contracts is unclear from both an economics and a legal point of view and although it is clear that the agency must address serious policy questions in determining under what circumstances it should permit the type of off-exchange metals contracts at issue here, we see nothing in this record to support at this time the District Court's conclusion that rule making procedures are inherently more productive of efficient policy making in this area than are adjudicatory proceedings. Where administrative officials are uncertain of the correct answer to a regulatory problem in the abstract, it is often not unreasonable for them to proceed on a case by case basis. The fact that the Commission changed its

mind and decided to investigate the problem in an adjudicatory proceeding does not mean that the Commission has decided to "railroad" the plaintiffs. It may simply mean that the Commission believes that an adversary proceeding with a factual record is the best way to define and resolve the issues because the initial effort at rule making indicates that the issues are more subtle and difficult than was first believed.

Unless Congress has acted to make the requirements of the commodities statute inoperative until the Commission issues implementing regulations applicable to commodities contracts for precious metals, we believe we must follow the general principle laid down in *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947). There the company attacked the agency's administrative order entered after an adjudicatory hearing on grounds that the agency should have acted by rule under section 4 of the Administrative Procedure Act rather than by order under section 5. The Court said:

> Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.
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> In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant regidifying its tentative judgment into a hard and fast rule. . . . In those situations, the agency must

> retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceedings by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administration agency.

Id. at 202-03.

Contrary to plaintiffs' argument, Congress itself has not required the Commission to engage in rule making respecting "margin" and "leverage" contracts prior to adjudication. The statute permits cash contracts off the commodities exchanges, but requires futures contracts to be executed through the exchanges. With respect to "margin" and "leverage" contracts — terms left undefined by the statute — Congress has provided with respect to most commodities that such contracts are illegal. 7 U.S.C. § 23(a). With respect to "margin" and "leverage" contracts for gold and silver Congress has provided as follows:

> No person shall offer to enter into . . . any transaction . . . under a standardized contract described in subsection (a) of this section, contrary to any rule, regulation, *or order* of the Commission designed to ensure the financial solvency of the transaction or prevent manipulation or fraud: Provided, that such rule, regulation, *or order* may be made only after notice and opportunity for hearing.

7 U.S.C. § 23(b) (Emphasis added). Under this provision of the statute, Congress does not expressly or by implication limit regulation of gold and silver "margin" and "leverage" contracts to rule making. It delegates authority to regulate by "order," i.e, adjudicatory proceedings, as well. We find nothing in the text of the statute or in the legislative history of the statute indicating an intent to prohibit the Commission from regulating metals contracts by

adjudication. Nothing in the statute indicates that Congress intended for the Commission to act by rule before it acts by order so long as the parties are given notice and an opportunity to be heard.

The Circuit and District Court cases cited by plaintiffs for the proposition that the agency must act by rule before it acts by order are not in point. In *Patel v. Immigration and Naturalization Service*, 638 F.2d 1199 (9th Cir. 1980) and *Ford Motor Company v. Federal Trade Commission*, 654 F.2d 599 (9th Cir. 1981) (withdrawn from publication for reconsideration), the court had before it final agency decisions after adjudicatory hearings, including complete factual administrative records. The Court did not have to speculate about the facts, the nature of the industry, the administrative standard to be applied, the remedy or sanction to be imposed and the effect on non-parties similarly situated. This distinction is crucial. Judicial insistence on clear administrative findings and reasoned decision making as a condition of review and enforcement is irrelevant if courts are going to decide the correctness of the agency's procedures, remedies and substantive rules and principles before the agency ever hears the case. It may be that the agency's findings will be erroneous because the agency's law respecting commodities contracts will be erroneous. But we do not know at this point. We cannot decide that question before the findings are made and the law is developed. We will have "final agency action" to review when that process is complete. The issuance of the complaint is not final.

Accordingly, the judgment of the District Court is reversed.

APPENDIX B.

Transcript of Opinion Rendered From the Bench by the Honorable Horace W. Gilmore, for the United States District Court, Eastern District of Michigan.

In the District Court of the United States for the Eastern District of Michigan, Southern Division.

Monex International, Ltd., and First National Monetary Corporation, Plaintiffs, vs. Commodity Futures Trading Commission, Defendant. Civil Action No. 81-74572.

. . . on December 17th, the Division respectfully requests that your Honor immediately thereafter convene a telephonic conference to schedule the inquiry into discovery matters and the haring on the merits unless we are enjoined from doing so. The Division of Enforcement would respectfully request that your Honor conduct the inquiry into the discovery matters in advance to the Christmas holidays and schedule the hearing on the merits to commence as soon thereafter as is practically possible.

Yes, I have seen that letter, yes. All right, sir. Well, we'll take a — I'll ask you to stick around until I either come back and tell you I have a decision or until I tell you to come back another time. So if you will just wait around, please.

(Court recessed at 3:40 P.M.)

(Court reconvened at 4:20 P.M.)

THE COURT: First of all, I want to thank all of you for the quick briefing that was done and for the assistance all of the lawyers have given me in trying to decide this very interesting and complex motion for preliminary injunction. I would have much preferred to have had the time to take this under advisement and spend the time that one likes to spend on a case like this that writing a formal opinion because I think the issues are of tremendous importance, but unfortunately because of the pressures of time I was unable to do that and I will therefore have to render an opinion from the bench, which will not be as polished nor as complete nor as thorough as I would like it, but I think hopefully will dispose of the issues in this case.

Now, this action arises out of the defendant Commission's pending administrative adjudication brought up against plaintiffs Monex and First National Monetary Corporation. The plaintiffs are in the business of buying and selling precious metals through certain contracts termed forward or cash forward contracts, and in August of 1979, the defendant Commodity Futures Trading Commission instituted administrative proceedings against both defendants — both plaintiffs.

The complaint filed against First National Monetary Corporation alleges that FNMC's cash forward contract is in reality a contract for a future delivery of a commodities within the meaning of the Commodities Exchange Act, 7 U.S.C., paragraph 1 and following. The complaint alleges that the sale of these contracts violates the section 4h of the Act, (7 U.S.C. 6h) because they are not sold through a member of a contract market.

The complaint against Monex states that Monex' forward contract is a contract for the future delivery of a commodity, and the sale of this contract violates section 4h because the contracts are executed otherwise than by or through a member of a contract market.

The complaints filed here by Monex and FNMC allege that the administrative proceeding being maintained by the defendant is unlawful in that it violates the due process clause of the United States Constitution and the Administrative Procedures Act and the parties are before the Court on plaintiffs' motion for preliminary injunction.

The complaints allege that injunctive relief is necessary because one, the Commission unlawfully seeks to accomplish the promulgation of a rule which will have wide spread application through the use of an adjudicatory proceeding.

Two, statutory provisions which the Commission seeks to impose on the defendant are void for vagueness on their face and as applied to plaintiffs.

Three, the administrative proceedings are being conducted in violation of the due process clause to have the Constitution.

Four, the prosecutorial arm of the Commission; that is, the Division of Enforcement, has engaged in prosecutorial misconduct.

Five, the Commission has previously identified the plaintiffs' contracts as leverage contracts and therefore is now estopped from proceeding against plaintiffs on the ground the contracts are futures contracts.

Six, the nature of plaintiffs' business makes the announcement of an adverse administrative determination a disaster which will irreparably harm the plaintiffs.

In order to obtain preliminary injunction, the plaintiffs must meet the following criteria. One, substantial likelihood that the moving party will prevail on the merits.

Two, irreparable injury. Three, overriding harm to plaintiff relative to defendant if relief is granted, and four, the public interest is served by the issuance of the relief.

The defendant maintains that the plaintiffs have failed to meet the criteria for a preliminary injunction. The defendant's principal arguments are the plaintiffs have not demonstrated a strong likelihood of success on the merits because, one, plaintiffs' failure to exhaust their administrative remedies bars judicial interventional at this time, and two, the issuance of an administrative complaint is not final agency action and therefore is not subject to review.

Judicial review of agency action is governed by the standards set forth the Administrative Procedures Act, 5 U.S.C., 701-706. The standards for judicial review set out by the APA apply unless, one, statutes preclude judicial review, or two, agency action is committed through agency discretion by law, 5 U.S.C. 701(a).

Section 704 of the APA specifically defines what agency actions are adjudicable, and it says, quote: Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a Court are subject to judicial review. A preliminary procedural or intermediate rule not directly reviewable is subject to review on the review of a final agency action. Since the Commodities Exchange Act does not make the issuance of a complaint or the decision to proceed with an adjudication reviewable, the agency's action can only be reviewed the it's a final agency action.

The defendant argues that plaintiffs seek judicial review of the facts and circumstances surrounding the issuance of the complaint and argues the Supreme Court is specifically held that the issuance of a complaint is not final agency action in Federal Trade Commission versus Standard Oil of California, hereinafter known as the Socal case.

In FTC versus Socal, the FTC served Standard Oil with a complaint averring that the Commission had reason to believe that the company was violating section 5 of the Federal Trade Commission Act, 15 U.S.C. 5 — 45. The Commission's authority to issue the complaint was contained in section 5b of the Act which provided in part, quote: Whenever the Commission shall have reason to believe that any person had been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, it shall issue and serve upon such person a complaint stating its charges. That is found in — close quote, found in 15 U.S.C. 45(b).

Standard Oil filed a complaint against the Commission in District Court alleging that the Commission had issued its complaint without having reason to believe that Socal was violating the Act. Socal sought an order declaring that the complaint was unlawful and requiring the complaint to be withdrawn. In support of this allegation the complaint

was issued without "reason to believe," Socal outlined a series of events, basically charging that the political pressure for an explanation of the gasoline shortage of 1973 forced the Commission to issue the complaint.

The complaint pointed to such things as the report by the Office of Energy Advisor of the Department of Treasury which are recommended that the complaint be withdrawn, and several failures of Commission's counsel to comply with orders of the ALJ to identify witnesses and documents on which the Commission intended to rely. The ALJ's recommendation that the complaint be withdrawn — and the ALJ's recommendation the complaint be withdrawn until more fully investigated.

The Supreme Court held the agency's action was not reviewable because the averment in the complaint that the Commission had reason to believe that Socal was violating the Act was not subject to judicial review because it was not a final agency action, and the Court stated, among other things, quote: The Commission averred in its complaint that it had reason to believe that Socal was violating the Act. That averment is subject to judicial review before the conclusion of the administrative adjudication only if issuance of the complaint was, quote, final agency action or otherwise was directly reviewable under 10(c) of the APA 5 U.S.C. 704. We conclude that the issuance of the complaint was neither.

Further on in the opinion, the Court said in summarizing: In sum, the Commission's issuance of the complaint averring reason to believe that Socal was violating the Act is not a definitive ruling or regulation. It had no legal force or practical effect upon Socal's daily business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the Act. These pragmatic considerations

counsel against the conclusion that the issuance of the complaint was final agency action.

Plaintiffs argue that the reasoning in Socal is not applicable. They claim they are not challenging the averments of the administrative complaint; instead they claim they are challenging the legality of the adjudication in light of the actions of the Commission indicating they would not challenge the forward type contracts.

Plaintiffs maintained that the issues raised by the complaint in this Court are different from the issues raised by the complaint in the administrative proceeding and argue that their Complaints are challenges to the Commission's authorities, not challenges to the administrative complaint by the Commission.

The plaintiffs argue that the instant case presents issues similar to those in *U.S. v. Cabrini Medical Center*, 639 F. 2d 908, 2nd Circuit, 1981. There a former employee of the Cabrini Medical Center alleged that he was discharged because of mental disability. The Government contended that this Department of Health and Human Service's Office of Civil Rights was authorized to investigate the employee's complaint under the Rehabilitation Act of 1973.

The Court concluded the Government did not have authority to investigate the hospital because the statutory scheme was not meant to authorize the government to investigate where the primary objective of the Medicare and Medicaid payments was not that of providing employment.

The Court noted on page 190 of 639 F. 2d, quote: Nor does the recent decision in Federal Trade Commission versus Standard Oil California benefit the government. The plaintiff oil companies in that case sought judicial review of an FTC complaint where no one questioned the statutory authority of the agency to investigate those companies. The Court held that the complaint was not a reviewable final

order and that the agency should have the choice to evaluate the facts itself to determine if the charge had merit. Here only the purely legal question of statutory jurisdiction was before the district court. Nothing in the Office of Civil Rights intended investigation might reveal — that the intended investigation might reveal could create jurisdiction if it did not exist on the facts before us. Were not second guessing OCR's investigative skills but rather determining whether it seeks to exercise those skills in an unauthorized manner. We see no point in permitting the government to institute an investigation with its attendant inconvenience, expense, and annoyance if there is and can be no authority for undertaking it, close quote.

In other words, the Court in Cabrini Medical Center was construing language which indicated that federal agencies are to concern themselves with investigation and enforce meant only where the primary objective of federal financial assistance is to provide employment.

In the instant case, there is no question the Commission has authority to issue the type of complaint it is issued. Section 6(b) of the Act, 7 U.S.C. 9 provides in pertinent part, quote: If the Commission has reason to believe that any person is violating or has violated any of the provisions of this chapter or of rules, regulations or orders of the Commission, it may serve upon such person a complaint stating its charges in that respect, close quote.

Plaintiff claims that given the vagueness of the Act and Commission's actions in first proceeding with rule making and indicating that plaintiffs' contracts were within the category known as leverage contracts, the Commission cannot bring an adjudication alleging that the plaintiffs' contracts are not leverage contracts but instead are contracts for future delivery which must be sold through a member of the contract market under section 4h of the Act.

Plaintiffs are basically claiming the contracts they offer are leverage contracts, that the Commission stayed a rule making procedure relating to leverage contracts and that the Commission cannot define plaintiffs' contracts as contracts for future delivery through an adjudication but must instead proceed to define the terms "leverage contract" and "contract for future delivery" through rule making proceeding — procedures. In this sense plaintiffs are challenge the Commission's authorities to issue the administrative complaint with the adjudication.

I think this case, the instant case, is closer to the situation found in Cabrini Medical Center, although it certainly is not identical with it. In Cabrini the Court was construing the statutory limits of the government's authority to conduct an investigation. Here the Commission does have the authority to conduct the investigation — to conduct adjudications. However, plaintiffs are challenging the authority of the Commission to proceed with this adjudication, and therefore, as I say, I think the case, although not on all fours, is much closer to Cabrini than to Socal.

Other policy reasons cited by the Court in Socal are not present here. In Socal the Court noted that judicial review to determine whether the Commission had the requisite reason to believe would delay resolution of the ultimate question whether the Act was violated.

Here review of the decision to proceed with an adjudication without clarifying the Act through rule making would not necessarily delay resolution of the ultimate issue. In fact, after the adjudications, plaintiffs could be expected to challenge the adjudication on the ground it was an abuse of discretion for the agency to proceed by adjudication.

In addition, the Court in Socal noted that every respondent to an FTC complaint could make the same complaint that Socal had made. That situation is much less likely in this

case. Once the rule making proceedings go through, no one will be able to bring the same challenge.

Further, the plaintiffs in the instant case have also complained of a denial of due process through the agency's inconsistent actions. It is unlikely that the agency will repeat the same series of events that led up to the issuance of the complaint in this case.

I think there is a distinction between this case and Socal. The critical distinction here is that plaintiffs are challenge the agency's authority to proceed in this manner. The complaint filed by FNMC, for example, alleges the four following — four — the four following grounds for issues of injunctive relief.

One, the Commission is required to proceeding by ruling making in attempting to subject FNMC's cash forward contracts to the Commission's authority.

Two, the Commission lacks jurisdiction to proceed through adjudication in challenging FNMC's cash forward contracts.

Three, by proceeding through adjudication the Commission is violating FNMC's due process rights.

And four, the Commission is barred by estopped from challenging FNMC's cash forward contracts through adjudication.

In deciding to — I therefore, hold that in deciding to proceed by adjudication rather than rule making, the defendant is taking a final agency action which this Court can consider, and that this is enough of a distinction to warrant a finding that this final agency action and thus reviewable, and Socal is not applicable in this case.

Now, with reference to rule making versus adjudication, the Supreme Court has said that an administrative agency is not precluded from announcing new principles in the adjudicative proceeding and that the choice between rule

making and adjudication lies within the first instance within the agency's discretion. *NLRB v. Bell Aerospace*, 416 U.S. 267, 279 — 294, a 1974 case, but the agency's discretion is not unlimited, as was pointed out in Bell Aerospace at 249 — 294, there may be situations where the agency's reliance on adjudication would amount to abuse of discretion.

The Supreme Court has not drawn clear lines indicating when the agency's reliance on adjudication would amount to an abuse of discretion. The cases upholding the right of the agency to proceed by adjudication do hint at situations in which the decision to adjudicate might be considered abuse of discretion.

In *SEC v. Chenery Corporation*, 332 U.S. 194 (1947) (Chenery II), the respondent argued that in an adjudication the SEC could not apply a general standard it had formulated for the first time in that proceeding.

The Court rejected that argument stating: The function of filling in the interstices of the Act should be performed as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. Any ridig requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise.

In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into hard and fast rules. Or the problem may be so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule. In these situations, the agency must retain power to deal with the problems on a case-by-case basis if the ad-

ministrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. I do not think that this case, however, is one for case-by-case evolution of statutory standards.

As Chenery II suggests, there are problems that are appropriate for resolution by adjudicative proceedings but not the ones we have here. The problems that are not specialized or problems which are foreseeable clearly should be resolved by rule making proceeding.

Similarly, the language in Bell gives some indication when an agency should proceed by adjudication. In Bell Aerospace, the Court said, quote, on page 295 of 416 U.S.: The possible reliance of industry on the Board's past decisions with respect to buyers does not require a different result (that is in the Court's conclusion that the Board's judgment that adjudication was proper was to proceed — was proper to proceed was entitled to gread deference). It has not been shown that the adverse consequences ensuing from such reliance are so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding. Furthermore, this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good faith reliance on Board pronouncements, nor are fines and damages involved here.

And I might emphasize and underline, as I recall, it is clearly applicable to this case, the Supreme Court's pointing out that Bell Aerospace was a case in which there some new liability — it was not a case in which some new liability was sought to be imposed for past actions taken in good faith reliance on Board pronouncements. That is very close to this situation.

Plaintiffs here argue that they have relied on the agent's past policy regarding leverage contracts and that they will face substantial adverse consequences in the adjudication.

They also argue that rule making is more appropriate here because it would allow all parties to participate and make Commission policy consistent with its leverage transaction regulatory efforts and because the issue is not specialized.

In *Patel v. Immigration & Naturilization Service*, 638 F. 2d 1199, 9th Circuit, 1980, plaintiffs sought a review of the decision of the INS, the Immigration and Naturalization Service, to deport him. But Patel applied for entitlement to stay in the U.S. because of the, quote, investor exemption, close quote.

The INS determined that Patel did not qualify for the investor exemption because an alien's investment must tend to expand job opportunities. In requiring that Patel's investment must tend to expand job opportunities, INS purported to be following two of its previous decisions (In re Heitland and In re Ruangswang).

The investor exception was initially created by regulation. The regulation required that an alien engage in an agricultural or commercial enterprise in which he had invested a substantial amount of capital. INS then promulgated a new regulation which required an investment of $10,000 and one year's of experience.

After the new regulation was promulgated, the Board decided Heitland under the earlier substantial amount of capital regulation and overruled earlier interpretations of ''substantial'' and stated that the investment must tend to expand job opportunities.

In dicta, Heitland had stated that expanding job opportunities requirement would also apply to the new regulations. The Board then applied the job-creation criteria Heitland to another case, In re Ruangswang, arising under an HEW regulation.

The issue in Patel was whether the Board could rely on Heitland to add a job-creation criteria to the facially clear

1973 regulation. The Court stated that issue was whether the Board had used its discretion by choosing to announce the job-creation criteria in the adjudicatory setting of Heitland rather than waiting for INS rule making and by applying the job-creation criterion to the Patel. The Court concluded that if the INS wished to add job creation criterion, I had it should have done so by the rule making procedure.

Similarly, in *Ford Motor Company v. Federal Trade Commission*, 654 F. 2d, 599, the 9th Circuit, 1981, the Court held that the agency should adopt a rule of law by rule making where the case before it called for a general standard, not a case-by-case determination.

Quoting from Patel, the Court said, quote, at page 601 of 654 F. 2d: The thrust of the Patel holding, therefore, is that agencies can proceed by adjudication to enforce discrete violations of existing laws where the effective scope of the rule's impact will be relatively small, but an agency must proceed by rule making if it seeks to change the law and establish rule of wide spread application, close quote.

The Court also cited from Davis, Administrative Law Treatise, section 7.25 for the proposition that courts should require agencies is just rule making procedures when the agency retroactively adopts new law and where the parties relied on the precedents.

The holdings of Ford and Patel are clearly applicable to the existing adjudication. The Commission is seeking to establish a rule in the instant adjudication that will apply to every member of the cash forward industry; that is, defining the cash forward contract as a future within the meaning of the Act. This would clearly have the effect of requiring on exchange trading of virtually every contract for the deferred delivery of an article which contained any contingency that could prevent delivery.

Rule making is appropriate here because the issues could be easily incorporated into the existing leverage rule mak-

ing, and adjudication, I feel, would cause severe hardships to the plaintiffs. Rule making is the only fair way of proceeding to establish a new rule that would have wide spread application, and I think the Commission is circumventing the rule — proposing to circumvent the rule making procedures by attempting to promulgate the precise rule it is proposing through adjudication.

It is, therefore, clear to me that the defendant should legally be required to proceed first with rule making rather than with adjudication.

Now, the defendant contends that the plaintiffs have an obligation exhaust administrative remedies and therefore preliminary injunction should not issue.

Exhaustion is not required here because the filing of the complaint represents a Commission's determination that it can proceed by rule making. Furthermore, this is a case where there is no need for exhaustion because the adjudicatory process itself is the object of the challenge. That being so, exhaustion would be a meaningless gesture.

The issue is whether the proceeding itself can go on, and the Court has concluded that it should not. Therefore, the Exhaustion Doctrine is inapplicable.

As was pointed out in *Ross v. SEC*, 609, F. 2d 570, at page 577, 2nd Circuit, 1979, quote: Appellants challenge the legal authority of the Commission to proceed against them. While the Commission's administrative proceeding is not plainly beyond its jurisdiction, nevertheless, to require appellants to exhaust their administrative remedies would be to require them to submit to the very procedures which they are attacking. Agency action is unnecessary to enable us to determine the validity of the challenged practice. There is no need for the exercise of discretion on the part of the agency, nor for the application of agency expertise, close quote. It is therefore clear that exhaustion is not required here.

Serious allegations have been made in this case by the plaintiffs with reference to the conduct and fairness of the administrative law judge assigned to this case. These were neither admitted nor denied by the defendant in oral argument and were not addressed in defendant's brief. The allegations are so serious that if true, they would raise a serious question as to the fairness of any hearing conducted in this case by the administrative law judge and a serious question as to whether the plaintiff has received or would receive due process at the hands of the administrative law judge, and I think it's particularly significant that there are many very serious allegations here which the defendant has chosen not to address and chosen merely to say it did not admit or deny.

There are other additional reasons for showing the possibility of irreparable harm and the likelihood the plaintiffs would prevail on the merits.

Plaintiff primarily argues that its circumstances within the gold and silver commodities industry is such that agency action here would destroy its reputation to such a degree that the public would not deal with it. Further, banks would not finance it.

The commodities industry is a highly volatile one, and particularly as to trading in gold and silver public reputation is critical. Trades with the dealer are made, cash is paid and the purchaser must await the delivery of the precious metal. If a cloud is cast over a broker, public apprehension develops as to whether the broker can make deliveries.

Plaintiffs claim as to irreparable harm unrecovered economic loss, unrecovered non-economic property right; that is, goodwill, unrecoverable loss of statutory and constitutional rights, loss and damage to reputation, loss of economic stability, loss of customer goodwill, loss of creditor confidence and serious impact on gold and silver market in the United States.

They also advance other claims of irreparable harm; such as, expense and burden of defending the action. Clearly the defense and burden of expending — of defending the agency action does not establish irreparable harm, but certainly I think there is a sufficient claim to irreparable harm that is made here. There has not been a serious meeting of in argument to say that there has been a showing of the possibility of irreparable harm.

Now, the defendant says that injury to reputation cannot establish that — reputational damage cannot establish irreparable harm and a — but the cases they cite are factually distinguishable and not persuasive.

The defendant says in his brief the Supreme Court has similarly held that damage to good will and reputation occasioned by administrative proceedings does not constitute irreparable injury, citing *Sampson v. Murray*, 415 U.S. 61, and *Meyers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41.

Sampson involved the discharge of an employee of the government who contested procedures employed during discharge proceeding. The government discussed the unique nature of the government concerns in matters of temination and balanced them with the plaintiff's allegation of humiliation and damage to personal reputation.

At page 91 of 415 U.S., the Court stated, quote: Respondent's complaint also alleges, as a basis for relief, the humiliation and damage to her reputation which may ensue. As a matter of first impression it would seem that no significant loss of reputation would be inflicted by procedural irregularities in effectuating respondent's discharge, and that whatever damage might occur would be fully corrected by administrative determination requiring the agency to conform to the applicable regulations. Respondent's claim here is not that she could not, as a matter of statutory or administrative right, be discharged, but only that she was entitled

to additional procedural safeguards in effectuating the discharge.

Assuming for the purpose of discussion that respondent made a satisfactory showing of loss of income and had supported of claim that her reputation would be damaged as a result of the challenged agency action, we think the showing falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction in this type of case, close quote.

And in referring to "this type of case," the Court meant employment termination cases where there is a strong policy of not enforcing personal service contracts and allowing the government to handle its own internal affairs.

The present case is not such a case, and even if it were, the statement as to reputation and irreparable harm was merely dicta. The Court has — with regard to Meyers, the Court makes only a tangential comment about irreparable harm and reputation, and it is not good authority for the present case.

The Court concludes that there is a sufficient likelihood of irreparable harm along with the substantial likelihood that the moving party plaintiff will prevail in the merits. The overriding harm to the plaintiffs relative to the defendants is outweighed strongly in favor of the plaintiffs, and certainly the public interest and the opinion of the Court would be served by the issuance of this injunction. Therefore, the Court will issue the preliminary injunction as requested.

MR. MILLS: Your Honor —

MR. LEMON: Your Honor, would the Court like counsel do prepare a preliminary injunction?

THE COURT: Please prepare it, submit it to the other side.

MR. MILLS: Your Honor, may I ask for a stay of the order pending appeal?

THE COURT: Well, that depends on what you want in terms of a stay. If you want a stay that will allow you to proceed with the hearing and proceed with the discovery as proposed in the letter by the Enforcement Division to the the administrative law judge, no, if that's what you mean.

MR. MILLS: That's what I mean.

THE COURT: Then I deny the stay. I think the injunction issues immediately and will remain in effect until satisfied by an appellate court.

MR. MILLS: Thank you, your Honor.

MR. TUCKER: Thank you, your Honor.

MR. SILVER: Your Honor, it's with the stipulation that these cases may be consolidated for all purposes.

THE COURT: I have no problem with that.

MR. SILVER: Fine. We'll prepare an order for your Honor.

(Whereupon Court was adjourned)

* * *

APPENDIX C.

Order.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, a Michigan Corporation (81-1750 & 82-1024), and Monex International, Ltd. (81-1803), Plaintiffs-Appellees, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants, No. 81-1750, No. 81-1803, No. 82-1024.

Filed: March 31, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

After oral argument on the merits and upon consideration of the briefs and the record in this case, the Court hereby vacates and sets aside the stay of administrative proceedings heretofore entered by the District Court. Considering the factors of likelihood of success on appeal, irreparable injury, injury to the public interest and the adequacy of administrative and legal relief, the Court concludes that the District Court erred in staying administrative proceedings pending appeal.

Accordingly, it is ORDERED that the stay of administrative proceedings heretofore entered by the District Court is vacated.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman,
Clerk

APPENDIX D.

Order.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, Defendants-Appellants.

Monex International, Ltd., Plaintiff-Appellee, v. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants, Nos. 81-1750, 82-1024, 81-1803.

Filed: June 9, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

Subsequent to the decision of this Court in this case filed May 3, 1982, the appellant timely petitioned the Court pursuant to Rule 40(a), Fed. R. App. P., for the Court to clarify its opinion. In the recitation of facts the Court stated at page 4-5 of its opinion:

> On November 20, 1979, the Commission moved back the effective date of its decision to treat *forward contracts* as futures contracts until June 30, 1980. On May 28, 1980, the postponement date was extended to October 1, 1982. (emphasis added)

This statement refers to decisions made by the Commission in the context of its rulemaking proceeding concerning leverage contracts involving gold and silver bullion and bulk coins. The question whether the "forward" or "cash forward" contracts offered by the plaintiffs are leverage contracts is an issue to be resolved in the administrative ad-

judicatory proceeding. To avoid any ambiguity the opinion of this Court should be clarified by substituting the words "leverage contracts" for the words "forward contracts." In all other respects the court adheres to its original opinion.

ENTERED BY ORDER OF THE COURT
/s/ John P. Hehman
Clerk

JUDGMENT.

United States Court of Appeals for the Sixth Circuit.

First National Monetary Corporation, Plaintiff-Appellee (81-1750, 82-1024), vs. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Defendants-Appellants (81-1750, 82-1024).

Monex International, Ltd., Plaintiff-Appellee (81-1803), vs. Commodity Futures Trading Commission, Philip McB. Johnson, Chairman, James M. Stone, Susan M. Phillips, and David G. Gartner, Commissioners, and George H. Painter, Administrative Law Judge, Defendants-Appellants (81-1803). Nos. 81-1750, 82-1024, 81-1803.

Filed: May 3, 1982.

Before: LIVELY and MERRITT, Circuit Judges; WEICK, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT,
John P. Hehman, Clerk,
/s/ John P. Hehman, Clerk

Issued as Mandate: June 9, 1982

COSTS: Pending

APPENDIX E.

Summary of June 2, 1982, Conference.

United States of America Before the Commodity Futures Trading Commission.

In the Matter of: First National Monetary Corp., and Monex International, Ltd., Respondents. CFTC Docket Nos. 79-56; 79-57.

Filed: June 7, 1982.

At the request of the presiding judge, an informal conference was convened at 10:00 a.m. on June 2, 1982. The parties were advised of their right to have a reporter present during this conference, but no such request was made. The informal conference was called in order ". . . to hear the views of the parties on the possible outcome of these proceedings, and the ramifications thereof."

At the opening of the conference, the presiding judge stated that the conference was essentially a last ditch effort to determine whether or not any reasonable basis existed for settling the issues in the proceeding. I noted that my general impression was that counsel for Monex appeared to be less intractable than counsel for FNMC and the Division, and I urged counsel for Monex to take the initiative in proposing a settlement immediately after the conclusion of the chambers conference. I noted that a decision adverse to Respondents could result in a deluge of Section 14 type hearings, and that I did not relish the prospect of a large number of *Matthews v. Monex* type hearings.

Counsel for Respondents have expressed the view to me that the Division attorneys are and have been extremely reluctant to discuss settlement, and that the Division attorneys prefer that settlement negotiations be done on a formal rather than an informal basis. Lead counsel for the Division was asked whether the scheduled hearing would be necessary if Respondents conceded that the contracts in issue

constituted a violation of Section 4h of the Act, and that Respondents would modify the contracts to conform to the Division's perception of a "leverage" contract. Lead counsel for the Division objected to the question, and there was no substantive response.

At one point during the conference, Mr. Tucker defended the presiding judge's Stay Order of October 2, 1980, and criticized the Commission's Order of May 1, 1981. My recollection is that Mr. Tucker professed not to grasp the import of the Commission's May 1 Order, and I attempted to clarify the matter for him by explaining that the Commission appears to see a distinction between the contracts in issue and "leverage" contracts.

During the conference, I commented that I would be more comfortable if this proceeding were akin to a rulemaking proceeding. There followed a colloquy between Mr. Silver and Mr. Seifert on this point.

Terms of a possible settlement were not discussed except for the question propounded to Mr. Seifert. At approximately 10:45 a.m., I urged the parties to engage in serious settlement negotiations, and that was agreed to by the parties. Counsel for one of the Respondents requested an opportunity to reconvene in the afternoon, and this matter was left open. There was no request from the parties to reconvene.

Dated this 7th day of June 1982
/s/ George H. Painter
George H. Painter
Administrative Law Judge

APPENDIX F.

Transcript of Proceedings.

United States of America Before the Commodity Futures Trading Commission.

In the Matter of: First National Monetary Corp., and Monex International., Ltd., Respondents. CFTC Docket Nos. 79-56, 79-57.

Washington, D.C. June 14, 1982.

Before: GEORGE H. PAINTER, Administrative Law Judge.

JUDGE PAINTER: Is it Article I or Article III, Mr. Silver?

MR. SILVER: That is my next motion, Your Honor.

JUDGE PAINTER: Well, the motion is considered and after appropriate consideration, denied.

MR. SILVER: We wish to move to dismiss on the grounds, Your Honor, that you are not an Article III judge under the Constitution of the United States.

JUDGE PAINTER: Considered and denied.

MR. SILVER: We would reassert, Your Honor, the motion for summary judgment on the grounds that this proceeding is both in violation of the Administrative Procedures Act and, more particularly, that this proceeding is an unlawful adjudicatory proceeding and should have been a rulemaking proceeding because it affects the industry. It is a rule of industrywide application.

JUDGE PAINTER: I have expressed by views on that matter, but the motion is denied.

MR. TUCKER: Your Honor, one last motion before we commence with the opening statements. And I do thank the Court for being tolerant of the aggressive advocates' litany of motions this morning.

The final issue is one which the Court addressed in passing during the status conference, but is not reflected in the status notes. There are pled by both respondents in these proceedings as defenses constitutional questions concerning the Act itself and the regulations, or lack thereof, under the Act. We intend to prove here today, and for the duration of these proceedings, that the Commodity Exchange Act, and, specifically, the definitions thereunder, are unconstitutionally vague. We have also pled several other constitutional infirmities. The Court may save time if the Court would opine whether the Court possesses the power or is without power to address constitutional issues at this hearing, and I ask this Court for clarification, if the Court would so choose at this time.

JUDGE PAINTER: I believe it is entirely appropriate for you to raise the constitutional issues, and I find that I do not have any authority to declare a regulation as unconstitutional or a section of the Act as unconstitutional.

MR. TUCKER: Thank you.

JUDGE PAINTER: Now, opening statements, Mr. Seifert.

MR. SEIFERT: Your Honor, I thank you for the opportunity to speak. I will be brief because I am of the view we should take advantage of this opportunity, after three years of pendency of this action, to introduce evidence and cease with argument.

As Your Honor has noted, the charge in this case is whether respondents have violated Section 4(h) of the Act in selling contracts for future delivery of commodities, other. . . .